IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL NO. 5:98CV44-V

In re:	)	
	)	
GARY W. BEAM and	)	Case No. 97-50520
DEBRA H. BEAM,	)	Chapter 7
	)	
Debtors.	)	
	)	
ANDERTON ASSOCIATES, INC.,	)	
	)	
Appellant,	)	
	)	
vs.	)	JUDGMENT
	)	
GARY W. BEAM and	)	
DEBRA H. BEAM,	)	
	)	
Appellees.	)	

For the reasons set forth in the Memorandum and Order filed herewith, **IT IS ORDERED, ADJUDGED, AND DECREED** that the decision of the bankruptcy court to deny Appellant's motion is **AFFIRMED** and this appeal is hereby **DISMISSED.**

THIS the 27th day of June, 2000.

RICHARD L. VOORHEES
UNITED STATES DISTRICT COURT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL NO. 5:98CV44-V

In re:	
GARY W. BEAM and DEBRA H. BEAM,	Case No. 97-50520 Chapter 7
Debtors.	
ANDERTON ASSOCIATES, INC.,	
Appellant,	
vs.	MEMORANDUM AND ORDER
GARY W. BEAM and DEBRA H. BEAM,	
Appellees.	

THIS MATTER is before the Court on appeal from the Order of United States Bankruptcy Judge J. Craig Whitley denying the motion of Anderton Associates, Inc. for Relief from Stay. Appellant perfected its appeal by filing a brief on August 28, 1998. Appellees filed a responsive brief on October 6, 1998.

This Court has jurisdiction to hear this appeal from the bankruptcy court pursuant to Title 28, United States Code, Section 158(a). In reviewing the decision of the bankruptcy court, this Court functions as an appellate court and applies the same standard of review. As such, factual findings are reviewed for clear error. Findings of fact are clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re Green, 934 F.2d 568, 570 (4th Cir. 1991)(citing In re First

Federal Corp., 42 B.R. 682 (W.D. Va. 1984)). In contrast, conclusions of law are reviewed de novo. Loudon Leasing Dev. Co. v. Ford Motor Credit Co., 128 F.3d 203 (4th Cir. 1997); In re Johnson, 960 F.2d 396 (4th Cir. 1992).

Appellant's issue on appeal is whether the bankruptcy court erred in finding that Appellant was not entitled to relief from the automatic stay to proceed with foreclosure on the Debtors' property. Upon a review of the materials before it and a consideration of the parties' arguments, the Court finds that Judge Whitley properly applied the relevant case law in reaching his findings on this issue. See Hofler v. Hill, 317 S.E.2d 670, 673 (N.C. 1984). Although Appellants attempt to rely on language in the guaranty agreement granting the general power to deal with the liabilities of Sports & Imports, Inc., Judge Whitley correctly focused his attention on the specific portion of the agreement relating to the waiver of contribution or indemnification from co-guarantors. Therefore, the Court finds that Appellant's arguments are without merit and that the findings of the bankruptcy court denying Appellant the right to foreclose on the property should be affirmed.

IT IS, THEREFORE, ORDERED that Appellant's Motion for Relief from Stay was properly denied by the bankruptcy court and that decision is hereby **AFFIRMED** and this appeal is hereby **DISMISSED**.

A Judgment dismissing this matter shall be entered herewith.

THIS the 27th day of June, 2000.

RICHARD L. VOORHEES
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

In Re:	)	
	)	
GARRY WAYNE BEAM and	)	
DEBRA HEAVNER BEAM,	)	**CASE NO.: 97-50520**
	)	**CHAPTER 7**
Debtor(s).	)	
	)	JUDGEMENT ENTERED ON MAR 2 4 1998

ORDER

THIS MATTER comes before the Court on the Motion of Anderton Associates, Inc. for Relief from the Automatic Stay and the Objection thereto by the Chapter 7 Trustee and the Response thereto by the Debtors. A hearing was held on March 3, 1998 in the United States Bankruptcy Court in Statesville, North Carolina. Appearances were made at the hearing by Paul Brown, on behalf of Anderton Associates, Inc., by Barrett Crawford, Chapter 7 Trustee, and by Keith Johnson, on behalf of the Debtor.

STATEMENT OF FACTS

The Male Debtor, Garry Beam, was the sole shareholder in a corporation known as Sports and Imports, Inc.(S & I). The primary business of S & I was the sale of automobiles. On September 26, 1996, the Debtors signed a Promissory Note (the Note) on behalf of S & I to Automotive Finance Corporation (AFC) under which AFC would provide floor plan financing of up to $450,000.00 to S & I. This Note was secured by a deed of trust in all of the collateral held by S & I. As further security, the Debtors signed an Unconditional Guaranty, securing the guaranty with a Deed of Trust on their residence, located at 3497 Governor's Island Drive, Denver, North Carolina. The loan was also guarantied by Timothy J. Anderton and Sherry K. Anderton by an Unconditional Guaranty dated December 31, 1996 and by Dale Morrow and

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Peter Fortkort by an Unconditional Guaranty dated September 25, 1996.

By February of 1997, S & I was in default under the Note to AFC. As a result, S & I, through its president, Gary Beam, executed a Release and Authorization in favor of AFC. This document granted possession to AFC of all collateral owned by S & I in order that it could be disposed of in a commercially reasonable matter. In May of 1997, AFC and Timothy and Sherry Anderton (collectively "the Andertons") entered into a Settlement Agreement, Sale and Assignment with AFC. Under this document, AFC assigned all of its rights under the Note, the Unconditional Guaranty, and the Deed of Trust that were executed by the Debtors and S & I. In consideration of this assignment, Timothy and Sherry Anderton executed a Promissory Note to AFC for approximately $207,670.00.

The Debtors filed bankruptcy under Chapter 7 on April 14, 1997. Anderton Associates, Inc. has now moved from relief of the automatic stay in order to foreclose on the Debtor's residence, located at 3497 Governor's Island Drive, Denver, North Carolina. In doing so, Anderton Associates, Inc. has alleged that it holds AFC's rights in the Unconditional Guaranty signed by the Debtors and secured by a Deed of Trust in the subject property.[1] S & I remains in default under the September 25, 1996 Promissory Note. The amount of the debt owed to AFC under the Promissory Note is $160,000.00, according to the Movants. However, this amount

[1] The Movant in this action is Anderton Associates, Inc., which appears to be a closely held corporation under the control of Timothy Anderton. The agreement to assign all rights of AFC under the September 25, 1996 Promissory Note was made between AFC and Timothy and Sherry Anderton (collectively "the Andertons"). It is under this agreement that Anderton Associates, Inc. alleges it has the assigned rights of AFC to foreclose on the Debtor's residence. However, Anderton Associates, Inc. is not a named party in that assignment agreement and there is no evidence showing how they have obtained the Anderton's rights. No party raised this as an issue so the Court will use Anderton Associates, Inc. and Timothy and Sherry Anderton (collectively "the Andertons") interchangeably to refer to the Movants in this action.

does not take into account collateral securing the Note totaling approximately $35,000.00 to $40,000.00 that is still in the possession of S & I. There was also evidence that other automobiles may have been sold and the proceeds have not been applied to the amount of the debt. The evidence presented also suggested that some of this debt was not the Debtors', but related to other deals between the Andertons and AFC.

The value of the Debtor's residence is $550,000.00 as listed in the petition. This property is encumbered by a first Deed of Trust in favor of Roosevelt Bank in the amount of $440,000.00. It is further encumbered by a second Deed of Trust in favor of the Governors Island Homeowners' Associations in the amount of $1,440.00. The third Deed of Trust is the instrument under which Anderton Associates, Inc. is seeking foreclosure.

CONCLUSIONS OF LAW

Movants argue that the amount of the debt owed under the Note is approximately $160,000.00 and therefore, there is no equity in the residence. The actual debt outstanding was unclear based on the evidence presented in the hearing. However, the establishment of the debt is not necessary to determine this matter. Instead, the Court looks to the documents executed by the parties, especially those executed by the Movants, in reaching its decision.

On December 31, 1996, the Andertons executed an Unconditional Guaranty to AFC to secure the September 25, 1996 Note. Part of that Guaranty which was signed by both Timothy and Sherry Anderton read as follows,

> "the undersigned each hereby irrevocably waive(s) all rights he/she may have at law or in equity (including, without limitation, any law subrogating the undersigned to the rights of AFC) to seek contribution, indemnification, or any other form of reimbursement from the Debtor, **any other guarantor**, or any other person hereafter primarily or secondarily liable for any obligations of the Debtor

> to AFC, for any disbursement made by the undersigned under or in connection with this guaranty or otherwise."

Defendant's Exhibit 3 (emphasis added). In signing this Guaranty, the Andertons became co-guarantors with the Debtors. The Debtor's Guaranty, dated September 25, 1996, contained the same language as above.

Absent a contract to the contrary, under North Carolina surety law,[2] the Andertons would be entitled to a pro-rata contribution from the Debtors. *See* N.C. GEN. STAT. § 26-5. However, case law makes it clear that sureties can contract for different indemnity than is provided under North Carolina surety statute. *See* Suttle v. Hill 311 N.C. 325, 328-329 (1984)(citing as support Commissioners v. Nichols 131 N.C. 501 (1902) and Bank v. Burch 145 N.C. 317 (1907)). In this case, the parties have done just that. Through the above language included in the Unconditional Guaranties executed by both the Movants and the Debtors, the parties have waived any rights to contribution or any other reimbursement from co-guarantors of the September 25, 1996 Promissory Note.

The Movants argue that they are not guarantors seeking foreclosure against the Debtors, but are instead acting as the assignees of AFC under the Note, Unconditional Guaranty, and Deed of Trust, pursuant to the May 23, 1997 Agreement. Since they are foreclosing as the direct payee under the Note and Guaranty, the Movants contend that they are not bound by the waiver language of the Unconditional Guaranty.

The North Carolina Supreme Court has expressed its disapproval of such a practice as the Movants are attempting. In Suttle v. Hill, 311 N.C. 325 (1984), the Supreme Court indicated its

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[2] Under North Carolina surety law, the word surety as used within the statute includes a guarantor. N.C. GEN. STAT. § 26-3.1(a).

doubts that a co-surety could contract with the lender for a liability different than one under North Carolina law and that the provisions of such a contract could be enforced. Id. at 329. In dicta, the North Carolina Supreme Court stated that, "Arguably one surety should not be allowed to contract with the principal for a different liability to the detriment of other sureties at least not without the consent of the other sureties." Id. at 330.[3] This Court agrees.

In the present case, the Andertons have attempted to accomplish what the North Carolina Supreme Court implied that a surety could not do - contract with the creditor, AFC, for different liability to the detriment of their co-surety, the Debtors. This Court will not allow the Movants to circumvent their original Unconditional Guaranty without the consent of their co-guarantors. The Movants cannot bring an action under the Note, Deed of Trust, and Unconditional Guaranty against the Debtors and have no right to foreclose upon their residence.

ACCORDINGLY, the Motion of Anderton Associates, Inc. for Relief from Stay is hereby DENIED.

IT IS SO ORDERED.

This the 24th day of March, 1998.

J. Craig Whitley
United States Bankruptcy Judge

[3] The North Carolina Supreme Court used the word "principal" in referring to the lender in Suttle.